Nos. 75-1838, 75-6957 and 75-7001

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In the Supreme Court of the United States

OCTOBER TERM, 1976

LIDDELL GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

AUDRENE HILL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

EUGENE C. KIRK, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 75-1838 App. A) is reported at 534 F. 2d 1262.

QUESTIONS PRESENTED

1. Whether the evidence at trial established the existence of multiple conspiracies or the single conspiracy charged in the indictment.

2. Whether evidence of recorded telephone conversations between certain petitioners and a government informant should have been excluded because the informant was not available to testify.

3. Whether the application for the wire interception order in this case sufficiently established that other investigative procedures were inadequate.

4. Whether the application for the intercept order should have identified petitioner Barnett as one whose conversations were to be intercepted.

5. Whether the trial court abused its discretion in allowing the jury to use transcripts while listening to the recorded conversations at trial.

6. Whether the continuing criminal enterprise statute, 21 U.S.C. 848, is unconstitutionally vague.

7. Whether the jury selection plan of the Eastern District of Missouri is improper because it compiles the names of potential jurors from voting lists at four-year intervals.

8. Whether the court erred in admitting the expert testimony of government chemists who identified certain substances as heroin.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, each of the nine petitioners was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846. In addition, each

petitioner was convicted of one or more related substantive offenses. Petitioner Eugene C. Kirk was convicted of four counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1); twelve counts of using a telephone to facilitate a conspiracy to distribute heroin, in violation of 21 U.S.C. 843(b); and one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Petitioner Gregory L. Kirk was convicted of one count of distributing heroin, in violation of 21 U.S.C. 841(a)(1). Petitioners Audrene Hill, Deborah Barnett, William Guy Hamilton, Liddell Green, Caroline Kirk, Marvin Bonds and Eddie Roberts were each convicted of one count of using a telephone to facilitate a conspiracy to distribute heroin, in violation of 21 U.S.C. 843(b).[1]

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[1]Eugene C. Kirk was sentenced to eight years' imprisonment to be followed by a special parole term of three years on the conspiracy count and to consecutive sentences of the same length on each of the four substantive distribution counts, for a total of 40 years' imprisonment and 15 years' special parole. This sentence is to be served concurrently with a 40-year term imposed for the violation of 21 U.S.C. 848, and with 12 consecutive two-year sentences imposed for the substantive counts involving use of a telephone to facilitate the conspiracy. Petitioner Gregory Kirk was sentenced to a term of ten years' imprisonment and three years' special parole on the conspiracy count, to be served concurrently with a sentence of ten years' imprisonment on the substantive count on which he was convicted. The other petitioners received two-year sentences on the substantive counts on which they were convicted, to be served concurrently with their sentences on the conspiracy count. On that count, petitioner Hamilton was sentenced to a term of 15 years' imprisonment to be followed by six years of special parole, petitioner Barnett received a ten-year term of imprisonment and six years of special parole, petitioners Roberts and Green received ten-year terms of imprisonment and three years of special parole, petitioner Hill received an eight-year term of imprisonment and six years of special parole, petitioner Bonds received an eight-year term of imprisonment and three years of special parole, and petitioner Caroline Kirk received a five-year term of imprisonment and four years of special parole.

The evidence, which is summarized in the opinion of the court of appeals (Pet. No. 75-1838 App. A-5 to A-7, A-8 to A-12) established that petitioner Eugene C. Kirk headed a large heroin trafficking enterprise in St. Louis, Missouri, in which the other petitioners were participants.

Between March 18, 1974, and June 18, 1974, undercover agents of the Drug Enforcement Administration (DEA) made four purchases of heroin from James Nofles. In the first of these transactions, the heroin was delivered to Nofles by a person who was subsequently followed to the residence of petitioner Eugene Kirk (Tr. 266, 399-400). The next three transactions occurred in and around the residence of co-defendant Gwendolyn Williams (Tr. 279-289, 472-473, 1839).

On August 6, 1974, Nofles was arrested by DEA agents (Tr. 181). After his arrest, Nofles agreed to assist the government investigation by arranging heroin purchases in telephone conversations which would be recorded by the agents (Tr. 182, 189-190, 197). Subsequent recorded telephone calls from Nofles to Eugene Kirk led to four separate purchases of heroin. In the first of these transactions, Nofles picked up the heroin at the residence of petitioner Hill (Tr. 198, 206, 231-232, 407-409, 1840). In the three subsequent transactions, the heroin was delivered to Nofles by petitioner Eugene Kirk, petitioner Gregory Kirk, and co-defendant Willie Johnson (Tr. 247-252, 261-265, 296-298, 306, 316-318, 414-416, 421-425, 454-459). After one of these transactions Nofles attempted to arrange a sale directly between Eugene Kirk and a DEA undercover agent. Kirk refused to deal directly, however, requiring that the undercover agent deal with co-defendant Willie Johnson (Tr. 426-430; Ex. 19).[2]

[2]"Ex." refers to the tapes and the transcripts of them.

When contacted by the DEA agent, Johnson indicated that he was a "deliverer" and that he had been with his source (Eugene Kirk) for ten years (Ex. 21).

On September 25, 1974, a court-authorized wire interception was instituted on two telephones at the residence of Eugene Kirk. Approximately 100 of the conversations recorded during the intercept were introduced into evidence at trial. These conversations, in some instances corroborated by surveillance testimony of DEA agents, disclosed numerous interconnected heroin transactions involving all petitioners and other co-conspirators. In addition to many local transactions, the conversations established that Eugene Kirk conducted negotiations with sources in San Francisco and San Diego, that he collected money from other conspirators (including petitioner Roberts) to achieve bulk purchases, and that he sent "runners" (including petitioners Barnett and Green) to California and New York to make the heroin purchases (Exs. 33-34, 36-38, 40-41, 43, 46-47, 50-53, 75, 79-82, 92, 97, 101-104, 108-115, 118, 120, 135, 144-145, 148, 151, 156, 164, 168, 172, 174A, 188, 189A, 191A; Tr. 1670-1671, 1853-1857, 1869-1883, 1945-1948).

ARGUMENT

1. Petitioners contend that the evidence at trial did not establish the existence of the single conspiracy charged in the indictment, but showed only a series of smaller conspiracies involving separate and isolated heroin sales between Eugene Kirk and the other alleged conspirators (Pet. No. 75-1838, pp. 17-20; Pet. No. 75-6957, pp. 4-8; Pet. No. 75-7001, pp. 19-22).

This claim was properly rejected by the court of appeals (Pet. No. 75-1838 App. A-7 to A-13). Not only was there evidence that various conspirators pooled their funds to make bulk purchases of heroin and sent out buyers to

make these joint purchases in New York and California (see p. 5, *supra*), but there was also a significant degree of interdependence between the conspirators in their local transactions. For example, if a distributor telephoned Eugene Kirk or Barnett seeking heroin, they would refer him to other distributors in the conspiracy on those occasions when they were unable to supply the heroin themselves (Exs. 85, 195-197).

Although some of the co-conspirators may not have known each other, each worked as part of a continuing unified enterprise with common goals. As the court of appeals found (Pet. No. 75-1838 App. A-13):

> The evidence was sufficient to show a nexus between each appellant and the conspiracy. * * * There was "evidence that each was aware of others in the line of distribution and of the larger nature of the operation in which he * * * played a part," * * * and that the "conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers." [Citations omitted.]

Accordingly, there was ample evidence to establish the existence of a single continuing conspiracy among petitioners to purchase and distribute heroin in St. Louis, as was alleged in the indictment. See *Blumenthal* v. *United States*, 332 U.S. 539; *Braverman* v. *United States*, 317 U.S. 49; *United States* v. *Mayes*, 512 F. 2d 637, 642-643 (C.A. 6), certiorari denied, 422 U.S. 1008.[3] There was

[3]There is no conflict between the instant case and *United States* v. *Bertolotti*, 529 F. 2d 149 (C.A. 2). The *Bertolotti* court found that the specific evidence in that case did not establish a single conspiracy. In *Bertolotti*, unlike the instant case, there was evidence not of a continuing relationship between the alleged co-conspirators, but rather of four unrelated narcotics transactions in which the sole connecting factor was the presence of two particular individuals in each of the transactions. *United States* v. *Sperling*, 506 F. 2d 1323, 1340 (C.A. 2), certiorari denied, 420 U.S. 962, quoted by petitioners (Pet. No. 75-6957, pp. 6-7), held that the evidence there established a single conspiracy; *Sperling* was one of the cases relied upon by the court below (Pet. No. 75-1838 App. A-13).

therefore no need to instruct the jury as to multiple conspiracies. *United States* v. *Barrera*, 486 F. 2d 333 (C.A. 2), certiorari denied, 416 U.S. 940. Nor did the district court abuse its discretion in denying petitioners' severance motions. *United States* v. *Hutchinson*, 488 F. 2d 484 (C.A. 8), certiorari denied, 417 U.S. 915.[4]

2. Petitioners contend (Pet. No. 75-7001, pp. 23-26) that recordings of telephone conversations of Nofles, the government informant, should have been suppressed because Nofles, who was killed shortly after petitioners' arrest (Tr. February 12, 1975, p. 33), was not available to testify regarding his consent to the recording of the conversation. Only petitioners Eugene Kirk and Barnett have standing to raise this issue, since only their conversations with Nofles were recorded. See *Alderman* v. *United States*, 394 U.S. 165; *Brown* v. *United States*, 411 U.S. 223.

[4]Petitioners (Pet. No. 75-6957, p. 7; Pet. No. 75-7001, pp. 21-22), relying on *Bruton* v. *United States*, 391 U.S. 123, also argue that the trial judge erred in admitting the statements of their co-defendants recorded during the existence of the conspiracy. *Bruton*, however, did not involve statements such as those here, which were admissible into evidence against all defendants as the declarations of co-conspirators in furtherance of the conspiracy. *Id.* at 128, n. 3. See *Dutton* v. *Evans*, 400 U.S. 74; *United States* v. *Nixon*, 418 U.S. 683, 701; Rule 801(d)(2)(E), Fed. R. Evid. *United States* v. *Nasser*, 476 F. 2d 1111 (C.A. 7), relied upon by petitioners, is inapposite; it involves the application of the *Bruton* rule to statements that were not made by a co-conspirator in furtherance of the conspiracy.

a. It is well established that a defendant's Fourth Amendment rights are not violated when the defendant's conversations with a government informant are recorded with the consent of the informant, and petitioners do not dispute this principle. *United States* v. *White*, 401 U.S. 745; *United States* v. *Rich*, 518 F. 2d 980, 984-985 (C.A. 8). It is also clear that the fact of the informant's consent may be established through other witnesses and that the recorded conversations may be utilized at trial even if the informant is not available to testify. *United States* v. *McMillan*, 508 F. 2d 101, 104 (C.A. 8), certiorari denied, 421 U.S. 916; *United States* v. *Bonanno*, 487 F. 2d 654 (C.A. 2); *United States* v. *Marrapese*, 486 F. 2d 918, 921 (C.A. 2), certiorari denied, 415 U.S. 994; see *United States* v. *White, supra; On Lee* v. *United States*, 343 U.S. 747.[5]

b. The court of appeals correctly rejected petitioners' additional contention that the informant's consent was coerced in this case (Pet. No. 75-1838 App. A-15):

> [The informant] was not threatened, coerced or promised immunity in exchange for his consent, but was only told that his cooperation would be made known to the prosecuting attorney. Consent has been found under lesser circumstances. [See *United States* v. *Rich*, 518 F. 2d 980 (C.A. 8).] * * *

[5]Petitioners' reference (Pet. No. 75-7001, pp. 24-25) to *Roviaro* v. *United States*, 353 U.S. 53, and *United States* v. *Norton*, 504 F. 2d 342 (C.A. 8), is inapposite. Those cases involved situations in which the defendants wanted to call the informant, who had been a witness to the criminal offense and whose identity they did not know, to give allegedly exculpatory evidence on the question of guilt or innocence. Here, petitioners claim only that a known informant was required to testify concerning a claim that evidence was obtained illegally. See *McCray* v. *Illinois*, 386 U.S. 300, 305.

> Viewing the totality of circumstances surrounding the recording of [the informant's] conversations with Kirk, it seems apparent that [the informant] gave his consent freely in hopes that the prosecutor would take his cooperation into account when the prosecution began. * * * The government met its burden of proving the voluntariness of the informant's consent.

See also *United States* v. *McMillan, supra; United States* v. *Bonanno, supra.*

3. Petitioners next argue that the intercepted conversations should have been suppressed because the intercept application failed sufficiently to establish the inadequacy of other investigative procedures (Pet. No. 75-1838, pp. 9-15; Pet. No. 75-7001, pp. 30-35).

18 U.S.C. 2518(1)(c) requires that each application for an order authorizing the interception of wire or oral communications shall include, *inter alia,*

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous * * *.

Similarly, the issuing judge must find that alternative investigative procedures are inadequate (18 U.S.C. 2518 (3)(c)).

The requirement of Section 2518(1)(c) is satisfied when—viewing the affidavit in a practical and common sense fashion—a sufficient factual basis is shown from which the issuing court can reasonably conclude that electronic surveillance is necessary to obtain evidence for the successful prosecution of persons known to be involved in the criminal activities under investigation, or is necessary to ascertain the full scope of such criminal activities and the

identity of the participants therein. See *United States* v. *Turner*, 528 F. 2d 143, 152 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996.[6]

The courts below correctly found the application in this case to be sufficient. It was shown in the affidavit in support of the application (see Pet. No. 75-1838, pp. 11-12) that several months of investigation—including visual surveillance, record checks, and the use of an informant to buy drugs and make recorded telephone calls—had been undertaken prior to the application for the interception order. These methods, however, had in fact failed to reveal the scope of the conspiracy or the identities of all the participants. Furthermore, the affidavit set forth Eugene Kirk's refusal to deal directly with undercover government agents and the fact that Kirk would not permit the informant to become familiar with the scope of the organization. It further explained that continued visual surveillance would be unlikely to succeed because it probably would be detected and because automobiles driven to Kirk's residence were parked in the rear of the building, thereby rendering it difficult to identify their occupants.

In sum, the facts set forth in the affidavit amply supported the issuing judge's finding that alternative investigatory methods "reasonably appear[ed] to be unlikely to succeed" in disclosing the scope of the conspiracy and

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[6]Section 2518(1)(c) "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States* v. *Kahn*, 415 U.S. 143, 153, n. 12. It does not require the government to try normal investigative techniques unless there is a reasonable likelihood that, if tried, such techniques would be successful. *United States* v. *Pacheco*, 489 F. 2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909; *United States* v. *Falcone*, 364 F. Supp. 877, 889 (D. N.J.), affirmed, 505 F. 2d 478 (C.A. 3), certiorari denied, 420 U.S. 955.

the identity of other participants therein, properly satisfying the requirement of 18 U.S.C. 2518(1)(c).[7]

4. Petitioners also contend that the conversations recorded during the wire interception should have been suppressed because petitioner Barnett was not named in the intercept application and order, even though, they claim, the government had probable cause to believe that her communications would be intercepted (Pet. No. 75-1838, pp. 7-9; Pet. No. 75-7001, pp. 27-29).[8] They rely upon 18 U.S.C. 2518(1)(b)(iv) and (4)(a), which provide that the application and order must include the identity of the person, if known, committing the offense and whose communications are to be intercepted.[9]

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[7]Petitioners incorrectly assert that the holding of the court below that the affidavit here was sufficient to meet the requirement of Section 2518(1)(c) is in conflict with *United States* v. *Kalustian*, 529 F. 2d 585 (C.A. 9). The *Kalustian* court apparently adopted a more stringent test for compliance with Section 2518(1)(c) than has been imposed by other courts of appeals (see, *e.g.*, *United States* v. *Steinberg*, 525 F. 2d 1126 (C.A. 2), certiorari denied, May 19, 1976, No. 75-1040). In *Kalustian*, the court held insufficient under Section 2518(1)(c) an affidavit which relied substantially upon the affiant's experience in other gambling cases to support his conclusion that normal investigative techniques would be insufficient. The affiant in the instant case, in contrast, did not rely on his experience in other narcotics cases, but upon the specific facts arising out of his investigation of Eugene Kirk to establish that the wire interception was necessary. Thus, the affidavit in the instant case was sufficient even under *Kalustian*.

[8]Only petitioner Barnett has standing to seek suppression on this basis. There has been no claim that probable cause existed as to any other individual who was not named in the wire interception order. The other petitioners cannot vicariously assert the rights of Barnett as a basis for suppression of evidence which was obtained without violating their own rights. See the government's brief in response to the petition for certiorari in *Civella* v. *United States*, No. 75-1813, pp. 6-7, a copy of which we are serving on counsel for petitioners.

[9]Although the two sections differ slightly in language, 18 U.S.C. 2518(4)(a) imposes no broader requirement than 18 U.S.C. 2518(1)(b)(iv). *United States* v. *Kahn*, 415 U.S. 143, 152.

At the time of the application for the interception order, government agents had observed sales of heroin to Nofles by some members of the Kirk organization, including petitioners Eugene Kirk, Gregory Kirk, and Audrene Hill. All the persons tied to the transactions by the observations of the agents were named in the application for the interception order. The agents did not have probable cause to believe petitioner Barnett was involved: she had not made any sales of heroin to government agents at the time of the application, nor had she been observed delivering any heroin (Tr. March 24, 1975, pp. 27-29, 36-38, 40-41).[10] The court below correctly found (Pet. No. 75-1838 App. A-19):

> The government is not required to name every person who might be recorded in the wire interception. Therefore, the fact that some of the appellants (mainly, Deborah Barnett) were not named in the application does not mean that the authorization order was invalid. The application named all the individuals whom the government had probable cause to suspect would be involved in telephone conversations with the principal, Eugene Kirk.

Given the court's factual assessment of the existence of probable cause in this case, the conflict in the circuits on the scope of the naming requirement in 18 U.S.C. 2518(1)(b)(iv) and 4(a) becomes entirely irrelevant, since no decision of any court of appeals requires the government to name persons in the application in the absence of

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[10]Although Nofles had apparently provided some uncorroborated information concerning petitioner Barnett prior to the application, and a person identified as "Debbie" had been involved in one drug-related conversation that was recorded by government agents, the agents were not aware at that time that the individual was petitioner Barnett (Tr. March 24, 1975, pp. 40-41).

probable cause. There is, accordingly, no need to defer action on this issue pending the disposition of *United States* v. *Donovan*, No. 75-212, certiorari granted, February 23, 1976, the outcome of which will not affect the proper disposition of this case.

5. Petitioners assert that the trial court erred in allowing the jury to utilize transcripts as an aid in listening to tape recordings of the intercepted conversations (Pet. No. 75-6957, pp. 8-12; Pet. No. 75-7001, pp. 14-16).

It is within the discretion of the trial judge to allow the jury to be furnished with copies of a transcript to assist them in listening to tape recordings played at trial. *United States* v. *McMillan*, 508 F. 2d 101 (C.A. 8), certiorari denied, 421 U.S. 916; *Fountain* v. *United States*, 384 F. 2d 624 (C.A. 5), certiorari denied *sub nom. Marshall* v. *United States*, 390 U.S. 1005. Petitioners have not shown that the trial judge abused his discretion in this case. The transcripts were not admitted into evidence. The agents who prepared the transcripts testified as to their accuracy, which petitioners had an opportunity to verify before the transcripts were provided to the jury. Furthermore, the trial court repeatedly instructed the jury that the transcripts were not evidence, but were merely the conclusions of the persons who prepared them, and that the transcripts were to be disregarded in case of any variance between the transcripts and the tapes (Tr. 223, 258, 302, 315, 434, 444, 1270-1271, 2385-2386).

Petitioners, relying on *Chavez* v. *Dixon*, 280 F. 2d 727 (C.A. 9), certiorari denied, 364 U.S. 934, and *United States* v. *Carson*, 464 F. 2d 424 (C.A. 2), assert that the trial judge was required to listen to the tapes prior to trial and make a specific finding of fact concerning the accuracy of the transcripts. *Chavez* did not involve the use of transcripts as an aid in listening to tape recordings, but instead concerned

the admission of allegedly inaccurate transcripts into evidence in lieu of the actual recordings. In *Carson*, the court of appeals did not require the trial judge himself to assess the accuracy of the transcripts; instead, it held that he properly allowed the defendants to examine the transcripts prepared by the government and prepare their own version where the parties could not agree. Petitioners were afforded a similar opportunity here, but they failed to act on it (Tr. February 5, 1975, pp. 14, 42). Even now, petitioners do not cite any discrepancies between the recordings and the transcripts. Finally, petitioners' claim of error is wholly refuted by the court of appeals' conclusion about this matter, reached after having listened to "virtually all of the tapes played for the jury" (Pet. No. 75-1838 App. A-23):

> [O]nce the ear is attuned and the listener becomes familiar with the dialect and inflections, the tapes are not incapable of comprehension and the relevant conversations which were transcribed become clearly understandable. Surely the jury would also be capable of understanding the recordings and making distinctions between the recorded conversations and the transcribed ones, if there were any.

6. Petitioner Eugene Kirk contends that the continuing criminal enterprise statute, 21 U.S.C. 848, is unconstitutionally vague on the ground that it fails to quantify precisely what constitutes "substantial income or resources" (Pet. No. 75-7001, pp. 17-18).

Section 408(b), Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1266, 21 U.S.C. 848(b), provides that a person is engaged in a continuing criminal enterprise if he commits a felony which

> * * * is a part of a continuing series of [narcotics violations]—
>
> (A) which are undertaken by such person in concert with five or more other persons with repect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

Every court that has considered the question has held that 21 U.S.C. 848 is not unconstitutionally vague. *United States* v. *Cravero*, 536 F. 2d 637, 641-642 (C.A. 5); *United States* v. *Sperling*, 506 F. 2d 1323 (C.A. 2), certiorari denied, 420 U.S. 962; *United States* v. *Sisca*, 503 F. 2d 1337 (C.A. 2), certiorari denied, 419 U.S. 1008; *United States* v. *Manfredi*, 488 F. 2d 588 (C.A. 2), certiorari denied, 417 U.S. 936; *United States* v. *Collier*, 493 F. 2d 327 (C.A. 6), certiorari denied, 419 U.S. 831.

It is well settled that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie*, 419 U.S. 544, 550. As the court below observed (Pet. No. 75-1838, App. A-25 to A-26):

> There was overwhelming evidence at trial establishing Kirk as the leader of a large and active narcotics distribution conspiracy. During the twenty days of the wire interception he received and made an incredible number of calls involving suppliers, distributors and buyers. The evidence established that Kirk dealt in large quantities of heroin and dealt with sufficient money to be able to send agents to New York and California to buy heroin. It was quite obvious that the work occupied Kirk on a more than full time basis, apparently for a number of years. * * *

Although the phrase "substantial income or resources" may not be quantitatively exact, in view of the evidence

presented here it "strains at technicalities to say that any issue of vagueness * * * as construed and applied is present in the case." *Williams* v. *United States*, 341 U.S. 97, 104. Cf. *United States* v. *Powell*, 423 U.S. 87; *Parker* v. *Levy*, 417 U.S. 733.

7. Petitioners assert that the jury selection plan of the Eastern District of Missouri is unconstitutional because the list of potential jurors is compiled from voting lists after each presidential election, thereby excluding from service those persons who reach voting age during the interim between the election and the trial. They also argue that in failing to remedy this alleged defect by prescribing an alternative source for the selection of additional names, the plan fails to comply with provisions of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* (Pet. No. 75-7001, pp. 36-40).

In *Hamling* v. *United States*, 418 U.S. 87, this Court rejected a similar contention. This Court recognized in *Hamling* that "some play in the joints of the jury-selection process is necessary in order to accomodate the practical problems of judicial administration" and that " 'purposeful discrimination' does not arise near the end of the period simply because the young and other persons have belatedly become eligible for jury service by becoming registered voters." *Id.* at 138.

An alternative source for the selection of additional names is required only where necessary to foster the purposes of the Jury Selection and Service Act. 28 U.S.C. 1863(b)(2). The specified purposes include the selection of a jury at random from a fair cross section of the community, without discrimination on account of race, color, religion, sex, national origin or economic status. 28 U.S.C. 1861 and 1862. Since the instant case involves

merely a justifiable administrative delay, not discrimination in violation of the purposes of the statute, see, *Hamling* v. *United States, supra*, 418 U.S. at 136-138, an alternative source was not required. See *United States* v. *Freeman*, 514 F. 2d 171 (C.A. 8); *United States* v. *Olson*, 473 F. 2d 686 (C.A. 8), certiorari denied, 412 U.S. 905.

8. Contrary to petitioners' assertion (Pet. No. 75-7001, pp. 12-13), the trial court did not err in admitting into evidence the testimony of several chemists who identified certain exhibits as heroin, without first making a determination concerning the general acceptance in the scientific community of the identification techniques used by the chemists. Since there is no indication in the record that the chemists used anything other than well established standard procedures in analyzing the suspected heroin, there was no need for an inquiry by the trial court into the general scientific acceptance of such techniques. *Moreno* v. *United States*, 391 F. 2d 280 (C.A. 5). Unlike the cases upon which petitioners rely, which involve the controversial techniques of polygraph testing and voice identification by spectrograph, qualitative analysis of substances to identify heroin is universally accepted as a proper subject for expert testimony. See *United States* v. *Nelson*, 499 F. 2d 965 (C.A. 8).

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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